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14 UNITED STATES DISTRICT COURT
15 NORTHERN DISTRICT OF CALIFORNIA
16 OAKLAND DIVISION
17

18 SUCCESSFACTORS, INC., a Delaware
19 corporation,

20 Plaintiff,

21 v.

22 SOFTSCAPE, INC., a Delaware
corporation; and DOES 1-10, inclusive,

23 Defendants.
24
25
26
27
28

Case No. CV 08 1376 CW

**PLAINTIFF'S REPLY MEMORANDUM IN
SUPPORT OF PRELIMINARY INJUNCTION**

Date: March 27, 2008
Time: 2:00 p.m.
Courtroom: 2
Judge: Hon. Claudia Wilken

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INTRODUCTION

The record is undisputed that Defendant's "Naked Truth" Presentation is, in reality, filled with lies and deception. In a stunning concession of unfair business practices, Defendant's Opposition now abandons any attempt to dispute the false and misleading nature of its slurs against SuccessFactors' product and integrity. *See* Opp. at 12:19-21.

No less amazing is the fact that, even while Defendant told this Court there is no threat of ongoing harm, its CEO has affirmatively directed his Sales Group to continue using any and all of the false information within the Presentation in ongoing sales efforts. In an email not provided the Court before the TRO, Mr. Watkins stated that the Presentation *document* "should only be used only for internal use by sales," but that "***Information contained in the document should be used judiciously in competitive situation as required.***" Mohr Decl. Exh. B (CEO Watkins' email of March 12, 2008) (emphasis added). Repeating this false information in sales calls is no less damaging, and no less actionable, than transmitting the document in writing. Continued false advertising is not only likely, but virtually certain, given Mr. Watkins' orders.

Most remarkable, however, are the facts discovered since the TRO reflecting not only a fraudulent scheme to obtain information to include in the Presentation, but CEO Watkins' apparent personal involvement. Beyond its repeated, unauthorized incursions into SuccessFactors' password-protected demo site (facts the Opposition does not dispute), Defendant also engaged in an elaborate ruse to obtain access to SuccessFactors' private client environments and confidential customer proposals. Defendant created a phony customer called "New Millenium [sic] Shoe," through which an individual named Ely Valls posed as a potential purchaser. Because she "loved the product," she brought in her remote "consultant" to view a private SuccessFactors demonstration over the internet and obtained a written sales proposal. The attendance records obtained for the demonstration now reveal that Ms. Valls and her consultant logged in *from Defendant's IP address in Wayland, Massachusetts*. The sales proposal Ms. Valls procured, clearly designated "SuccessFactors, Confidential," was excerpted and pasted into what Mr. Watkins has called "our" Naked Truth document. Mohr Decl. Exh. B. Ms. Valls, it turns out, is connected directly to CEO Watkins, listed as one of his six "friends" on Facebook.com.

1 See Matheson Reply Decl. ¶¶ 2-12, Corrales Reply Decl. ¶¶ 2-16 & Exhs. 1-4; Premo Decl. ¶¶ 5-
2 11 & Exhs. 3-6.

3 With its head buried firmly in the sand, Defendant contends that the Court can trust that
4 no future harm could possibly occur, because *after* the lawsuit was filed, the same Mr. Watkins
5 advised his sales group that the Presentation “is a Softscape confidential document and should be
6 used only for internal use by sales.” Mohr Decl. Exh. B. This is the same Mr. Watkins who
7 directed his employees to use the Presentation’s “information” (*id.*), and who, after the TRO,
8 issued a press release, followed up with a personal email to customers, falsely stating that the
9 Presentation was “based on substantiated facts.” Bernshteyn Reply Decl. ¶¶ 10, 12 & Exhs. 3-4.

10 On its face, the Presentation appears intended for distribution to SuccessFactors’ sales
11 prospects. But even assuming that management ever intended it not to be made public, Defendant
12 has offered no explanation for its circulation *other* than by its own employees. Defendant is thus
13 fully liable in *respondeat superior*. When a salesperson distributes a sales document to sales
14 prospects, he engages in his sales function—whether or not the particular mailing was authorized.

15 The fact that Defendant still has not reported to the Court how the initial mail occurred
16 underscores the necessity of an injunction. General Counsel Mohr states that Defendant “remains
17 unaware” of who circulated the mass email the first time, in purported violation of company
18 policy. Mohr Decl. ¶ 9. But if the “policy” did not work the first time, Defendant cannot
19 possibly ensure that no further recirculation will occur in the months before trial. By contrast,
20 this Court’s injunction *can* reach not only Defendant’s management, but all its employees and
21 others acting in concert, and not only the Presentation, but all false statements within it.

22 Indeed, if Defendant were genuine in its stated desire to prevent further dissemination, an
23 injunction binding all persons to stop this deceptive conduct would impose no hardship
24 whatsoever. The Court’s preliminary injunction should issue.

25 **THE FACTUAL RECORD**

26 Defendant has still provided the Court with no information about the Presentation’s creation
27 or distribution. We still are not told who created the document; to whom it was distributed; and
28 what contemporaneous instructions were given about its use internally or with customers. While

1 Ms. Mohr submits a declaration that lacks foundation (*see* Plaintiff’s Objections to Evidence), there
 2 is no declaration from Mr. Watkins or anyone else with personal knowledge of, or authority over,
 3 the sales function. Despite the TRO and Order to Show Cause, Defendant has submitted to the
 4 Court *no additional facts* beyond those opposing the TRO.

5 The single exception is Mr. Watkins’ email. Ironically, it confirms his instructions to the
 6 Sales Group—the day after this lawsuit was filed—to continue to use the information from the
 7 Presentation “judiciously” in competitive situations. *Id.* Exh. B. Mr. Watkins does not exclude
 8 from continuing use any of the virulently false statements. Nor does he exclude the information
 9 snatched from the password-protected website, the fraudulently attended private demonstration, or
 10 the misappropriated customer proposal. To the contrary, the next sentence of his email tells the
 11 sales force (falsely) that “[t]he Naked truth [sic] is based on publicly available information,” *id.*—
 12 reinforcing that all its contents are fair game. Moreover, his email puts no limit on use of
 13 statements from the Presentation that are falsely attributed to SuccessFactors’ customers—directly
 14 contrary to clause 3 of the TRO. Defendant has submitted nothing suggesting any effort to comply
 15 with the existing TRO’s prohibition on false attributions.

16 Mr. Watkins’ instruction to continue to using information from the Presentation exposes
 17 the real meaning of Mohr’s carefully phrased declaration. She states that, “to the best of my
 18 knowledge,” Defendant “has never used . . . and will not use the Presentation in any *external*
 19 *sales meeting or marketing effort.*” Mohr Decl. ¶ 5 (emphases added). Apparently sales *calls*—in
 20 which salespersons “judiciously” convey “information” from the Presentation in a “competitive
 21 situation”—don’t qualify as use of the Presentation in “meetings” or “marketing efforts.”

22 In Opposition to the TRO, Defendant suggested to the Court that Softscape acted
 23 responsibly to curtail dissemination: “when this matter was brought to our attention, our CEO
 24 sent an email to all sales staff reaffirming the confidentiality of this document and that it was not
 25 to be released outside the company.” Mohr TRO Decl. ¶5. In fact, the circulation of the
 26 Presentation was widely and publicly known by March 5, and connected with SuccessFactors’
 27 stock downgrade on March 7. *See* Bernshteyn Opening Decl. ¶¶ 3, 18-19 & Exhs. 1-3. No one
 28 selling in this industry could have missed this explosive event. Yet Mr. Watkins waited a week to

1 send out his email, until March 12 at 5:45 p.m., just before the Opposition to the TRO was filed.
2 Mohr Decl., Exh. B.

3 Meanwhile, on March 10, with the Presentation having just falsely trumpeted that
4 SuccessFactors had lost 63% of its customers, Softscape found it an opportune time to issue its
5 own press release proclaiming 98% customer retention. See “Softscape Exceeds 3.4 Million
6 Users,” http://softscape.com/us/pr2008/pr_08_0310_dominates.htm. What was the precipitating
7 “news” giving rise to this release just three days after the gmail blast? Softscape’s achievement
8 of the very odd number of 3.4 million users. Defendant also orchestrated a March 14, 2008 press
9 release falsely reiterating that the Presentation was “based on substantiated facts,” and, to make
10 sure no one missed it, Mr. Watkins’ mass email the same day to customers linking to the very
11 same press release. Bernshteyn Reply Decl. ¶¶ 9-12 & Exhs. 3-4.

12 When Mr. Watkins finally sent out his email to sales, rather than forcefully insisting that
13 no further circulation would be tolerated, he cautioned that the Presentation document “*should* be
14 used only for internal use by sales.” Mohr Decl. Exh. B. (emphasis added). He asks for
15 volunteers to “let me or Susan know” if they had information about dissemination, without even
16 mentioning the gmail account, and while promising that “[a]ll discussions will be kept
17 confidential.” *Id.* Defendant claims that Ms. Mohr “continues to investigate,” but it provides no
18 information to the Court. For example, have all sales staff been interrogated about their use of the
19 gmail account? Have the obvious searches of Defendant’s computer systems for that email
20 address been performed? Defendant’s investigation is reminiscent of Louie’s decision in
21 *Casablanca* to “round up the usual suspects.” Nothing in the record would convince an employee
22 that he would be caught, or punished, if, weeks or months from now, he slipped a copy of the
23 Presentation to a wavering or curious customer.

24 Ms. Mohr describes Mr. Watkins’ email as “reaffirming the confidentiality of the
25 document to the Sales Group.” *Id.* ¶ 6. One can only ask, where is the original affirmation?
26 There is no legend designating the Presentation as “confidential” or for Softscape’s internal use.
27 Indeed, the name Softscape never appears in the entire document. Defendant has produced no
28 enclosure email, memo, or instructions for use—nothing corroborating or communicating any

1 contemporaneous intent of confidentiality, only statements after the lawsuit was filed.

2 By contrast, the contents of the Presentation—complete with slick graphics and screenshots
3 that need to be seen to persuade—appear designed to be circulated to customers, preferably with
4 anonymity. Other than for anonymous distribution, why else use the SuccessFactors template,
5 name, and logo on every page, without mentioning Softscape once? Wouldn't an internal
6 Softscape sales piece include some comparison points describing Softscape's advantages?
7 Moreover, the Presentation is framed as a statement *by* a customer *to* a prospect—not a statement
8 by a company to its sales force. Thus, Page 2 falsely states that “This presentation is a compilation
9 of the facts from SuccessFactors’ customers,” and that “These facts represent the measure of
10 SuccessFactors’ lack of corporate integrity and why *many of us* have left them” (emphasis added).
11 Pages 23, 24, 25, 28, 29, 34, 37 and 43 all use the second person, “you” or “yours,” to refer to
12 prospects, not salespersons, as the intended audience. The Presentation compiles lists of dozens of
13 companies falsely described as being lost or dissatisfied customers (*e.g.*, pp.13-22), a quantity of
14 information that salespersons would not transmit over the phone. Every inference is that this false
15 information was originally compiled to be *seen* by customers, not merely to be delivered orally and
16 “judiciously,” as Mr. Watkins has now instructed.

17 ARGUMENT

18 I. WITHOUT INJUNCTIVE RELIEF, PLAINTIFF CONTINUES TO FACE A 19 SIGNIFICANT THREAT OF IRREPARABLE HARM.

20 A. Loss Of Goodwill From False Advertising Constitutes Irreparable Harm.

21 It is well settled that destruction of goodwill with current and prospective customers
22 constitutes irreparable harm that cannot be remedied in simple dollars and cents. *See, e.g.,*
23 *Stuhlberg Int'l Sales Co., Inc. v. John D. Brush & Co., Inc.*, 240 F.3d 832, 841 (9th Cir. 2001)
24 (affirming preliminary injunction where plaintiff would otherwise lose goodwill because of
25 defendant's interference with ability to consummate sales); *Coca-Cola Co. v. Tropicana Prods.,*
26 *Inc.*, 690 F.2d 312, 317 (2d Cir. 1982) (reversing denial of preliminary injunction where false
27 advertising could cause plaintiff, a direct competitor, to lose market share and thus be irreparably
28 harmed). False advertising directed at a competing product is particularly pernicious because it

1 “necessarily diminishes that product’s value in the minds of the consumer” and deprives the
 2 competitor of a “legitimate competitive advantage.” *See McNeilab, Inc. v. Am. Home Prods.*
 3 *Corp.*, 848 F.2d 34, 38 (2d Cir. 1988) (affirming preliminary injunction).

4 As well substantiated by the comments from prospective customers, the vicious
 5 statements in the Presentation are “alarming” and “disturbing” to customers; engender “too much
 6 negativity to overcome”; cause buyers to believe that purchasing SuccessFactors products will
 7 “make me look bad”; and lead readers to believe that “if a tenth of it is true . . . SF is not a
 8 product to consider purchasing.” Bernshteyn Opening Decl. ¶¶ 17-22 & Exhs. 2-6; Bernshteyn
 9 Reply Decl., Exh. 1. Defendant does not and cannot dispute this devastating evidence of injury to
 10 goodwill.

11 This injury is irreparable regardless of whether the false advertising takes the form of a
 12 further tangible transmission of the Presentation, or continuing efforts by Defendant’s salespeople
 13 to tell customers misleading information from it. *See Valu Eng’g, Inc. v. Nolu Plastics, Inc.*, 732
 14 F. Supp. 1024, 1026 (N.D. Cal. 1990) (preliminarily enjoining defendant’s salespeople from
 15 using or even referring to the false representations and deceptive demonstrations of plaintiff’s
 16 product). An injunction should prevent irreparable injury from all forms of communication,
 17 whether spoken or printed. *Id.*; *see J.K. Harris*, 253 F. Supp. 2d at 1130 (preliminarily enjoining
 18 making of false statements “in any manner whatever” as “harmful to the business reputation and
 19 goodwill of Plaintiff”).¹

20 **B. Continued False Advertising Is Likely, From Repetition of the Information In**
 21 **the Presentation, And From Circulation of the Presentation Itself.**

22 **1. Repetition of False Information Contained In the Presentation.**

23 Regardless of whether the Presentation itself is further circulated, Mr. Watkins’ email has
 24 specifically directed further use of the information it contains. Mohr Decl., Exh. B. There is no
 25 limitation preventing use of false information, pilfered information, or statements misattributed to

26 _____
 27 ¹ The cases cited by Defendant are inapposite. Quite simply, none of the cases relied on by
 28 Defendant involve a situation in which the defendant specifically directed its employees to
 continue its campaign of false advertising, and allowed its sales force to hold onto, and continue
 to rely upon, infringing materials.

1 third parties. Just as in *J.K. Harris* and *Valu Engineering*, the injunction here should prohibit all
 2 further repetition of each of the statements shown to be false in the moving papers, as spelled out
 3 in the accompanying Proposed Preliminary Injunction Order.

4 Moreover, while Defendants' proclamations of the accuracy of the Presentation in press
 5 releases and emails may seem to some like a clever away around the TRO, they are every bit as
 6 false as the original. These reaffirmations should be included within the Court's injunction. *See*
 7 *Valu Engineering*, 732 F. Supp. at 1026 (enjoining reference to false statements).

8 **2. Risk of Further Circulation of the Presentation.**

9 Ms. Mohr states that, to the best of her knowledge, Defendant did not "authorize, allow,
 10 permit, condone or ratify" the original dissemination. Mohr Decl. ¶ 5.² Given Defendant's
 11 inability to control the initial dissemination—when Defendant at least had a motivation to keep
 12 the defamatory script a secret—there is no reason to believe that its continuing non-authorization
 13 will prevent recurrence. A statement by Mr. Watkins that the Presentation "*should* only be used
 14 internally"—when he appears himself to be directly involved in the fraudulent practices that led
 15 to its creation—cannot ensure that further distribution will not recur.

16 Indeed, Mr. Watkins' involvement may well explain why Defendant has been
 17 lackadaisical in its investigation and/or unwilling to share the results. Only this Court's
 18 intervention can reach all involved. This is precisely why Federal Rule 65(d) allows injunction
 19 not only of "the parties to the action, their officers, agents, servants, employees, and attorneys,"
 20 but also "those persons in active concert or participation with them who receive actual notice of
 21 the order."³

22 **C. The Need for an Injunction Is Not Mooted by Defendant's Supposed** 23 **Voluntary Cessation.**

24 Defendant's argument that management's pledge not to distribute the Presentation makes
 25

26 ² In fact, Defendant did nothing to address circulation of its "confidential" Presentation for a
 27 full week after the gmail, and meanwhile issued its own press release touting its customer
 28 retention.

³ According to Softscape's website, Softscape has channel partners, consulting partners,
 technical partners, and referral partners, none of which are under Mr. Watkins' direct control.

1 an injunction superfluous has no legal support. Opp. at 7:10-27. “[I]t is actually well-settled ‘that
 2 an action for an injunction does not become moot merely because the conduct complained of was
 3 terminated, if there is a possibility of recurrence, since otherwise the defendants would be free to
 4 return to [their] old ways.’” *FTC v. Affordable Media, LLC*, 179 F.3d 1228, 1237 (9th Cir. 1999)
 5 (cites omitted) (affirming the prohibitory components of preliminary injunction). Accordingly,
 6 the voluntary cessation standard “is a stringent one.” *Id.* The party opposing the injunction has a
 7 burden to “show that subsequent events [have] made it **absolutely clear** that the allegedly
 8 wrongful behavior cannot reasonably be expected to recur.” *Id.* at 1232, 1238 (emphasis added;
 9 cites omitted) (discounting defendant’s pledge to cease making false and misleading statements).

10 Here, where Mr. Watkins himself appears to be involved (and has not testified otherwise),
 11 his email does not proscribe Defendant’s salespeople from exploiting the falsehoods in the
 12 Presentation, Defendant’s control has been historically ineffective, and non-parties are not bound
 13 by Defendant’s promises, Defendant has not approached its burden to prove that the wrongful
 14 behavior will not recur.

15 **II. PLAINTIFF HAS DEMONSTRATED A STRONG LIKELIHOOD OF SUCCESS** 16 **ON THE MERITS.**

17 **A. The Lanham Act Claims Will Succeed.**

18 **1. The Falsity of the Statements Is Undisputed.**

19 As discussed in SuccessFactors’ opening brief, the Presentation is false in its entirety
 20 because it is premised on a false notion that it was created by customers and based on information
 21 received from them. *See* Application for TRO at 15:1-13. Plaintiff also identified at least a dozen
 22 specific, material, verifiably false statements contained in the Presentation, including statements
 23 that some of Plaintiff’s best and biggest customers are dissatisfied, and that it has lost 63% of its
 24 customers. *See id.* at 15:18-18:3. Defendant does not dispute the falsity of any of these
 25 statements.⁴ Under *J.K. Harris*—a case decided by this Court, arising under similar facts, cited
 26 in Plaintiff’s opening brief, but conspicuously ignored by Defendant—these statements should be

27
 28 ⁴ Ms. Mohr initially stated that the Presentation “contained what I believed [past tense] to be accurate information.” First Mohr Decl. ¶ 4. Her second declaration goes silent on the subject.

1 enjoined. 253 F. Supp. 2d. at 1129-30 (preliminarily enjoining each statement that plaintiff
2 attested to be false, where defendant did not produce competent evidence of their truth).

3 **2. Defendant Is Continuing Actively to Propagate These Falsehoods in**
4 **Commerce.**

5 Rather than defend the substance of the Presentation, Defendant rests its Lanham Act
6 defense entirely on the proposition that it has not authorized its distribution. *See, e.g., Opp.* at
7 11:7-9, 13:15-19. Yet it is undisputed that Defendant's CEO has instructed his sales group to
8 continue using the information contained in the document for competitive purposes. *See* Mohr
9 Decl. ¶ 6 & Exh. B. Defendant has also continued to falsely advertise, in press releases and
10 emails, that the Presentation was "based on substantiated facts." Bernshteyn Decl. ¶¶ 10-12 &
11 Exhs. 3-4.

12 Defendant misses the bigger picture: it has no right to disseminate the false and
13 misleading statements *in any form* and certainly cannot, as it now proposes, use the false
14 document as a script for its sales force "judiciously" to deploy. *See, e.g., J.K. Harris*, 253 F.
15 Supp. 2d at 1131 (preliminarily enjoining "Defendants, and their agents, servants, employees,
16 successors and assigns, and all other persons acting in concert with or in conspiracy with or
17 affiliated with Defendants," from "making, disseminating, or causing to be made or disseminated
18 to the public . . . *in any manner* . . . the allegedly false statements" identified by the defendant)
19 (emphasis added); *see also, e.g., Hearst Bus. Publ'g, Inc. v. W.G. Nichols, Inc.*, 76 F. Supp. 2d
20 459, 464-65 (S.D.N.Y. 1999) (preliminarily enjoining defendant from using script for
21 telemarketers that was false and misleading).

22 **3. The Suggestion That Defendant Did Not Distribute the Presentation,**
23 **and Is Not Responsible for Distribution by Its Employees, Is Baseless.**

24 As to distribution of the Presentation itself, the argument that Defendant is not responsible
25 for its distribution is both unsupported by competent evidence and defeated by the principles of
26 *respondeat superior*. On the first point, the only evidence is Ms. Mohr's declarations. She does
27 not claim to have been involved in the creation of the Presentation, present when Defendant
28 provided it to employees, or monitoring employees' use of it. Nor does she offer a shred of

1 information about Defendant's investigation regarding its distribution. *See* Mohr Decl. ¶ 9. The
 2 Court could not reasonably determine that Ms. Mohr's conclusion that Defendant did not
 3 distribute the Presentation rests on an adequate factual foundation. *See* Objections to Evidence.

4 Indeed, while Ms. Mohr states that "Softscape did not distribute the Presentation," *two*
 5 *paragraphs later*, in the same declaration, she states that "Softscape does not know how *or by*
 6 *whom* the Presentation was released" and acknowledges that it may have been distributed by a
 7 Softscape employee. Mohr Decl. ¶ 7 (emphasis added). She simply doesn't know.

8 Defendant has offered no explanation for release of the Presentation, other than potential
 9 distribution by a Softscape employee. *Id.*; Opp. at 11 n.2. The facts of record strongly support
 10 this inference. The gmail was targeted to email addresses for individuals who had personal
 11 responsibility for purchase decisions for specialized, human resources software at some 33 known
 12 (and countless unknown) enterprises, most of whom were live sales prospects. Bernshteyn Reply
 13 Decl. ¶ 6; Webb Reply Decl. ¶¶ 2-12. Defendant's sales force uniquely had access to the
 14 Presentation and to these specialized addresses, as well as a motive to sell Defendant's products
 15 to these prospects.

16 Defendant's liability for the tortious acts of its employees is determined under the doctrine
 17 of *respondeat superior*. Rest. (3d) Agency § 2.04 ("An employer is subject to liability for torts
 18 committed by employees while acting within the scope of their employment."); *Spectravest, Inc.*
 19 *v. Fleet Street, Ltd.*, 13 U.S.P.Q.2d (BNA) 1457, at *11 (N.D. Cal. 1989) ("[T]he normal rule of
 20 *respondeat superior* applies to copyright infringement by an employee who is acting within the
 21 scope of her employment."). A sales person, sending to sales prospects, a document her employer
 22 developed for use in sales, in the hope of selling her employer's product, is plainly acting within
 23 the scope of employment. In fact, there is no competent evidence of any instruction to the sales
 24 team *not* to distribute this document before it was sent.⁵

25 Of course, Defendant would still be liable even if it proved that it *had* instructed its sales
 26 group not to distribute the document. Rest. (3d) Agency § 7.07 cmt. c ("Conduct is not outside

27 ⁵ Defendant's anticipatory defense, based on notions of authority and apparent authority, is
 28 misplaced. *See* Opp. at 11 n.2; Rest. (3d) Agency, Intro. ("The doctrine of authority and apparent
 authority . . . do not govern or explain the application of respondeat superior.").

the scope of employment merely because an employee disregards the employer's instructions."); *Lisa M. v. Henry Mayo Newhall Hosp.*, 12 Cal. 4th 291, 296-97 (1995) (torts committed without authorization may still be within scope of employment). Collaborating in deception with Mr. Watkins' friend Ely Valls, Defendant created and provided to its sales force a competitive sales document, not marked confidential, filled with false and misleading statements, containing information affirmatively intended to be communicated to Plaintiff's customers and prospects, and which lent itself to anonymous distribution. The idea that Defendant would now be shielded from liability for the natural consequence of its actions (*i.e.*, an employee ended up distributing the Presentation) is contrary to law. *See, e.g., Lisa M.*, 12 Cal. 4th at 300 (test of whether an employee's act is within the scope is whether it is "generally foreseeable"); Rest. (3d) Agency § 7.07(2) (an employee's act is not within the scope of employment only "when it occurs within an independent course of conduct not intended by the employee to serve *any* purpose of the employer") (emphasis added).

To summarize: (1) Defendant has reaffirmed and directed its employees to continue disseminating concededly false information; and, (2) Defendant has provided no competent evidence that it was not the source of the original dissemination, nor a basis to escape liability for dissemination by its employees. These facts demonstrate a strong likelihood of success on the only elements of the Lanham Act claims challenged by Defendant: (1) use in commerce; (2) commercial speech attributable to the Defendant; and (3) that Defendant "caused" the false and misleading statements to enter interstate commerce. *See Opp.* at 11:3-13:21.

B. The Trademark Infringement Claim Is Likely to Prevail.

Defendant does not dispute that external circulation of the Presentation constitutes trademark infringement, responding only that Defendant allegedly has not authorized external circulation. For the reasons just demonstrated for false advertising, Defendant *is* likely liable for distribution of the Presentation to date, and there is real risk that further distribution will persist.

C. The Computer Fraud and Abuse Act Claim Is Likely to Prevail.

Defendant also does not dispute the conclusions reached as a result of Mr. Matheson's careful investigation: that it accessed without authorization Plaintiff's password-protected

1 computer network from multiple locations. Defendant admits it created a Presentation that
 2 incorporates elements of Defendant's protected computer environment, as well as the
 3 demonstration material and sales proposal obtained by false pretenses through Ely Valls. *See*
 4 First Mohr Decl. ¶ 4; Second Mohr Decl. ¶ 2 (reaffirming earlier declaration); Application for
 5 TRO at 4:26-5:15; Matheson Decl. ¶¶ 5, 7, 10; Matheson Reply Decl. ¶¶ 2-12; Corrales Reply
 6 Decl ¶¶ 2-16 & Exhs. 1-4; Premo Reply Decl. ¶ 5-11 & Exhs. 3-6.

7 Plaintiff has the chutzpah to defend its unauthorized access of Defendant's computer system
 8 on the ground that it did not cause sufficient "loss" to Plaintiff under the CFAA. *See* Opp. at 9:16-
 9 10:24.⁶ To get there, Defendant presents a truncated and misleading statement of the statutory
 10 definition of loss, claiming that it covers only "'damage assessment' and restoration of the
 11 computer system, and lost revenue because of the interruption of service." *Id.* at 9:24-26. The
 12 language of the statute itself is much broader, however. Cognizable loss includes

13 *any reasonable cost to any victim, including the cost of responding to an offense,*
 14 *conducting a damage assessment, and restoring the data, program, system, or*
 15 *information to its condition prior to the offense, and any revenue lost, cost*
 16 *incurred, or consequential damages incurred because of interruption of service.*

17 18 U.S.C. § 1030(e)(11) (emphases added).

18 On its face the statute includes "the cost of responding to an offense" as part of the loss
 19 calculation. *See id.* This standard has been understood overwhelmingly as including costs spent
 20 investigating the unauthorized intrusion into a computer, even under cases cited by Plaintiff. *See,*
 21 *e.g., Healthcare Advocates, Inc. v. Harding, Earley, Follmer & Frailey*, 497 F. Supp. 2d 627, 647
 22 (E.D. Pa. 2007) (hours spent by plaintiff's president investigating unauthorized access of protected
 23 computer constitute loss because "the statute allows the costs of time spent assessing computer
 24 systems to be counted towards the loss requirement"); *P.C. of Yonkers, Inc. v. Celebrations! The*
 25 *Party & Seasonal Superstore*, 2007 U.S. Dist. LEXIS 15216, at *13-*17 (D.N.J. Mar. 2, 2007)
 (cognizable losses include "losses sustained in responding to defendants' actions, investigating

26 ⁶ Earlier, Defendant's original counsel suggested that access to a password-protected computer
 27 environment without the permission of the computer's owner was not "unauthorized" within the
 28 meaning of the CFAA. In light of clear Ninth Circuit authority to the contrary, this argument was
 sensibly withdrawn. *See Creative Computing v. Getloaded.com, LLC*, 386 F.3d 930, 932 (9th
 Cir. 2004); *United States v. Middleton*, 231 F.3d 1027, 1212 (9th Cir. 2000).

defendants' actions and taking remedial steps to prevent defendants' further actions"); *Nexans Wires S.A. v. Sark-USA, Inc.*, 319 F. Supp. 2d 468, 474 (S.D.N.Y. 2004) (plaintiff did not meet \$5,000 threshold because "no computers are said to have been examined, and no computer consultant [was] said to have been present" at meetings discussing the unauthorized access).

Defendant tries to carve out of the statutory definition of loss "[t]he cost of investigating and trying to locate the perpetrator," and for this proposition cites *Tyco Int'l (US) v. Does*, 2003 U.S. Dist. LEXIS 25136, at *8-*9 (S.D.N.Y. Aug. 29, 2003). *Tyco*, in turn, cites *United States v. Middleton*, 231 F.3d 1207, 1213-14 (9th Cir. 2000), for the proposition that the CFAA does not permit recovery for costs incurred "locating and collecting information about the hacker." *Id.* With due respect to the *Tyco* court, *Middleton* says no such thing. Rather, *Middleton* endorsed an expansive interpretation of the \$5,000 loss requirement and affirmed the sufficiency of the evidence to support a finding of the loss. In particular, the Ninth Circuit specifically accepted as evidence of loss the time spent "investigating the break-in." *Middleton*, 231 F.3d at 1212-14;⁷ *see also Thurmond v. Compaq Computer Corp.*, 171 F. Supp. 2d 667, 682 (E.D. Tex. 2001) ("[T]he holding in *Middleton* addressed loss that was a 'natural and foreseeable result' of any damage.")

Here, following a breach of its network by unidentified persons, Plaintiff's Director of Web Development undertook analysis of which restricted environments had been accessed (to determine the extent of breach); collection and analysis of IP addresses accessing Plaintiff's network, to determine whether access was internal or hostile (to determine the appropriate response); and review of logs of documented users to confirm conclusions. Matheson Opening Decl. ¶¶ 5-18. These reasonable responses took many hours of valuable time away from day-to-day responsibilities, causing losses well in excess of \$5,000. *Id.* ¶ 4; Bernshteyn Opening Decl. ¶ 4; *see also* Matheson Reply Decl. ¶ 13 (additional investigative time spent upon discovery of further unauthorized access). The statutory requirement is met. Because this is the only element

⁷ *Middleton* found such loss to fall within the required category of "measures . . . reasonably necessary to restore the data, program, system, or information that you find was damaged or what measures were reasonably necessary to resecure the data, program, system, or information from further damage." *See id.* at 1213. The Court did not—either explicitly or by implication—exclude from its calculation investigation focused on identifying the source of the break-in. *See id.* at 1214. To do so would make no sense: it would be impossible to determine how best to resecure a compromised computer without figuring out who gained access and in what manner.

1 of the statute disputed by Defendant, it follows that Plaintiff has shown a strong likelihood of
 2 success on the merits and therefore the injunction should issue.⁸

3 Furthermore, Plaintiff is also entitled to relief under California's Comprehensive
 4 Computer Data Access and Fraud Act (CCDAFA). *See* Cal. Pen. Code § 502; Docket No. 19
 5 [Proposed Order re Application for Temporary Restraining Order; Complaint ¶¶ 58-67 (invoking
 6 CCDAFA). CCDAFA provides a civil remedy, including injunction, against any person who:

7 (2) [k]nowingly accesses and without permission takes, copies, or makes use of
 8 any data from a computer, computer system, or computer network, or takes or
 9 copies any supporting documentation, whether existing or residing internal or
 10 external a computer, computer system, or computer network, [or]. . . (7)
 [k]nowingly and without permission accesses or causes to be accessed any
 computer, computer system, or computer network.

11 Cal. Pen. Code § 502(c)(2), (7); *id.* § 501(e)(1)-(2) (providing for civil action, including
 12 injunction). While the state statute prohibits essentially the same conduct as the CFAA, *see, e.g.,*
 13 *Therapeutic Research Faculty v. NBTY, Inc.*, 488 F. Supp. 2d 991, 996-99 (N.D. Cal. 2007)
 14 (denying motion to dismiss both CFAA and CCDAFA claims on same facts), it does not contain
 15 a minimum-loss provision. Because Defendant has conceded unauthorized access of Plaintiff's
 16 computer network, *see* Opp. at 9:16-24, an injunction prohibiting future unauthorized access is
 17 available under the federal and state statutes.

18
 19
 20
 21 ⁸ The remaining cases cited by Defendant are equally unavailing. For example, Defendant cites
 22 *Nexans Wires*, 319 F. Supp. 2d 468, for the proposition that "costs of misappropriation of trade
 23 secrets" are excluded from the analysis. Whether or not that statement is correct is irrelevant,
 24 because Plaintiff here has not claimed such damages in support of the loss requirement. *See*
 25 Matheson Opening Decl. ¶ 4; Bernshteyn Opening Decl. ¶ 4. This statement also ignores the
 26 remainder of the opinion, which, as noted above, makes clear that investigation by technical
 27 employees *would* constitute loss. 319 F. Supp. 2d at 477. *Thurmond v. Compaq Computer*
 28 *Corp.*, 171 F. Supp. 2d 667 (E.D. Tex. 2001), was a class action lawsuit in which the court
 refused to consider as a "loss" the fees incurred by an expert witness "retained solely for
 litigation" and where it appeared that the fees were in fact paid by class-action counsel, not the
 named plaintiffs. *Id.* at 682-83. Finally, in *United States v. Schuster*, 476 F. 3d 614 (7th Cir.
 2006), the Seventh Circuit held that the costs asserted by the government with respect to victims
 of the defendant's violation of the CFAA were barred under *federal sentencing guidelines*, not the
 CFAA loss requirements. *See id.* at 618-20 (analyzing U.S.S.G. § 2B1.1, which "expressly
 excludes from loss calculations '[c]osts to the government of, and costs incurred by victims
 primarily to aid the government in, the prosecution and criminal investigation of an offense'").

1 **III. THE SCOPE OF THE TRO IS READILY CONVERTED INTO A PRELIMINARY**
 2 **INJUNCTION.**

3 Defendant raises two concerns about the scope of the TRO, relating to (1) the scope of
 4 trademark use, and (2) statements attributed to others. Both concerns are easily addressed.

5 *First*, Defendant does not seriously dispute that external use of the Presentation would
 6 constitute trademark infringement. Plaintiff, conversely, does not dispute a right to make limited,
 7 nominative fair use. SuccessFactors therefore requests an injunction against “disseminating, or
 8 causing to be made or disseminated, or making any other public use of Plaintiff’s trade name,
 9 trademark or logo beyond that amount of the name reasonably necessary to identify Plaintiff or its
 10 products and services.” Proposed Preliminary Injunction Order, at 5.

11 *Second*, Defendant’s concern about overbreadth in TRO clause (3) may be resolved by
 12 enjoining all necessary persons from “representing or implying that another person or entity
 13 actually authored any statement regarding Plaintiff (including without limitation the Presentation
 14 or any statement therein) which such person or entity did not explicitly so author.” *Id.*

15 Finally, Plaintiff requests that the TRO be expanded expressly to enjoin dissemination of
 16 all false information in the Presentation, as well as the Presentation itself. *Id.* at 4-5.

17 **CONCLUSION**

18 For the foregoing reasons, Plaintiff SuccessFactors, Inc. respectfully requests that the
 19 Court enter a preliminary injunction enjoining Defendant Softscape, Inc. from false advertising,
 20 trademark infringement, and computer fraud and abuse, on the terms set forth in the
 21 accompanying Proposed Preliminary Injunction Order.

22 Dated: March 21, 2008

Respectfully,

23 FENWICK & WEST LLP

24 By: /s/ Laurence F. Pulgram

25 Laurence F. Pulgram

26 Attorneys for Plaintiff
 27 SUCCESSFACTORS, INC.
 28

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SUCCESSFACTORS, INC.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

SUCCESSFACTORS, INC., a Delaware
corporation,

Plaintiff,

v.

SOFTSCAPE, INC., a Delaware
corporation; and DOES 1-10, inclusive,

Defendants.

Case No. CV 08 1376 CW

**[PROPOSED] ORDER GRANTING
PRELIMINARY INJUNCTION**

Date: March 27, 2008
Time: 2:00 p.m.
Courtroom: 2
Judge: Hon. Claudia Wilken

Date of Filing: March 11, 2008
Trial Date: No date set

Plaintiff SuccessFactors, Inc.'s ("SuccessFactors" or "Plaintiff") motion for issuance of a preliminary injunction against Defendant Softscape, Inc. ("Softscape" or "Defendant") came on regularly scheduled hearing before this Court. Laurence F. Pulgram and Patrick E. Premo of Fenwick West LLP, appeared on behalf of SuccessFactors. Jessica L. Grant and Jonathan A.

1 Patchen of Taylor & Company Law Offices, LLP, appeared on behalf of Defendant Softscape,
2 Inc. (“Softscape” or “Defendant”).

3 Based upon Plaintiff’s Application for Temporary Restraining Order and Memorandum in
4 Support thereof, its Reply Memorandum in Support of Preliminary Injunction, the accompanying
5 supporting declarations, the remaining papers filed with the Court in this matter by each side, and
6 upon hearing of this matter, for the reasons detailed below, the Court finds that Plaintiff has
7 demonstrated: (1) a combination of probable success on the merits and the possibility of
8 irreparable harm, and/or (2) that there exists serious questions regarding the merits and the
9 balance of hardship tips sharply in Plaintiff’s favor. *GoTo.com v. Walt Disney*, 202 F.3d 1199,
10 1204-05 (9th Cir. 2000); *Rodeo Collection, Ltd. v. West Seventh*, 812 F.2d 1215, 1217 (9th Cir.
11 1987).

12 1. Defendant does not dispute that it authored the 43-page PowerPoint presentation
13 entitled “SuccessFactors: Workforce Performance Management / The Naked Truth”
14 (“the Presentation”).

15 2. Defendant does not dispute that the Presentation used SuccessFactors’ PowerPoint
16 template and includes SuccessFactors’ name and logo on each page; the SuccessFactors’ name
17 and logo are the subject of federal trademark registration and pending applications.

18 3. Defendant does not dispute that its employees, consultants or agents accessed and
19 obtained content from: (a) SuccessFactors’ webinar at
20 <http://www.successfactors.com/media/webinars/introduction-to-ultra/>, which was launched on
21 January 18, 2008; (b) SuccessFactors’ customers’ page at
22 <http://www.successfactors.com/customers/list/>, which was last updated on or about February 28,
23 2008; and (c) a password-protected “ACE” sales demo environment, ACE275 specifically, for
24 demonstrating the SuccessFactors’ solution to customers and prospects.

25 4. Plaintiff has established that ACE275 is a password-protected sales demo account
26 that was improperly accessed by Softscape in February 2008 for the purpose of obtaining
27 competitively sensitive information.

28 ///

1 5. Plaintiff has offered sworn, verified statements attesting to the falsity of specific
2 statements contained throughout the Softscape Presentation as described more particularly below.

3 6. Softscape has not offered any competent, admissible evidence to contradict or
4 establish the truthfulness of such statements.

5 7. Softscape's CEO, Dave Watkins, has admitted that information contained within
6 the Softscape Presentation was meant to be used by its sales representatives "in competitive
7 situations as required" and specifically so instructed his Sales Group on March 12, 2008.

8 8. After the temporary restraining order in this action issued on March 13, 2008,
9 Softscape issued a press release on March 14, 2008, asserting that the Presentation is "based on
10 substantiated fact" and its CEO sent an e-mail thereafter to customers linking to this press release.

11 9. Defendant asserts that it still does not know how or by whom the Presentation was
12 released, even after Plaintiff provided notice of this action on March 11, 2008, creating a
13 significant risk of republication of the Presentation and its contents.

14 10. Defendant Softscape has threatened, or is about to do, or is procuring or suffering
15 to be done, acts in violation of the rights of Plaintiff respecting the subject of this action, and
16 tending to render the remedies Plaintiff seeks ineffectual.

17 11. Plaintiff is likely to suffer great or irreparable injury before the trial of this action.

18 12. Pecuniary compensation would not afford Plaintiff adequate relief.

19 13. The Court previously found that "Plaintiff has made a sufficient showing that
20 serious questions regarding the merits exist and the balance of hardship tips sharply in its favor to
21 justify issuing a temporary restraining order. (Dkt. No. 26.)

22 14. Based on further submissions presented by Plaintiff and Defendant, Plaintiff is
23 likely to succeed on the merits of its claims of: (a) false and misleading statements under
24 15 U.S.C. § 1125 and Cal. Bus. & Prof. Code §§ 17500, *et seq.*, (b) trademark infringement under
25 15 U.S.C. §§ 1114 and 1125, (c) violation of the Computer Fraud and Abuse Act (CFAA)
26 18 U.S.C. § 1030, and unauthorized access to computers, computer systems and computer data
27 under Cal. Penal Code § 502.

28 15. The balance of hardship tips sharply in Plaintiff's favor.

16. Plaintiff has demonstrated a possibility of irreparable harm.

17. Plaintiff has already posted \$10,000 in connection with the temporary restraining order, which amount shall serve as deposit in lieu of bond for this preliminary injunction, as it is not likely that Defendant will suffer any damage as a result of this preliminary injunction.

GOOD CAUSE HAVING BEEN SHOWN THEREFOR, IT IS ORDERED THAT:

Defendant Softscape and its officers, agents, servants, employees, successors and assigns, and all other persons acting in concert with, or in conspiracy with, or affiliated with Defendant, are hereby enjoined and restrained during the pendency of this action from doing, causing, aiding or abetting any other person in doing any of the following acts, directly or indirectly:

1. Disseminating, publishing, causing to be made available to the public, directing any person to, or affirming the purported truth or accuracy of the "Presentation," attached as Exhibit 1 to Declaration of Robert Bernshteyn in Support of Application for Temporary Restraining Order ("Bernshteyn Decl.") (Dkt. No. 17);

2. Disseminating, publishing, causing to be made available to the public, repeating, uttering, or affirming, by any writing, advertising, press release, e-mail, other publication, electronic communication, or oral statement, or in any other manner whatever, the allegedly false or misleading statements set forth within the Presentation which were identified in Plaintiff's Application for Temporary Restraining and the Bernshteyn Decl. ¶¶ 8-16, specifically, including the following statements:

a. That the Softscape Presentation is "a compilation of the facts from Successfactors customers;"

b. That "facts" contained within the Softscape Presentation "represent the measure of Successfactors' lack of corporate integrity and why many of us have left them;"

c. That "63% of Their [SuccessFactors'] Customers Left Them by 2008" and that "1 out of 2 customers leaves Successfactors [sic] within 2-3 years," or any other false statements about SuccessFactors' customer retention rate;

d. That "[a]fter six months Sears Pulled the Plug on the entire project," or any other statement stating that that Sears is not a current customer;

1 e. That Merrill Lynch and Apple Computer are “Customers [who] are
2 dissatisfied, have left [SuccessFactors] and are not listed on their Website;”

3 f. That MasterCard is not a referenceable customer;

4 g. That Bank of America, Reebok, Symbol Technologies, Peregrine Systems,
5 and Portal Software are customers who left SuccessFactors because they were dissatisfied;

6 h. That SuccessFactors “can’t handle situations where an employee changes
7 their positions and manager during the year;”

8 i. That SuccessFactors employs 440 consultants, or spends “1,650 hours of
9 effort for each of its customers;”

10 j. That SuccessFactors’ database structure creates a security risk;

11 k. That SuccessFactors “will add any feature or change they want without
12 asking you if you want it,” and will “install the change without telling” customers;

13 l. That SuccessFactors’ customers are required to scroll though long forms in
14 SuccessFactors’ product; and

15 m. That customers who were formerly identified on Plaintiff’s website
16 (<http://www.successfactors.com>) but are no longer identified therein are, by virtue of not being
17 listed, necessarily former customers or presumptively dissatisfied;

18 3. Representing or implying that another person or entity actually authored any
19 statement regarding Plaintiff (including without limitation the Presentation or any statement
20 therein) which such person or entity did not explicitly so author.

21 4. Disseminating, or causing to be made or disseminated, or making any other public
22 use of Plaintiff’s trade name, trademark or logo beyond that amount of the name reasonably
23 necessary to identify Plaintiff or its products and services;

24 5. Accessing for any reason or obtaining data from any computer system or computer
25 owned, operated, or licensed by SuccessFactors and subject to restrictions on access without
26 SuccessFactors’ express written authorization, and, further, disclosing, publishing, reproducing,
27 or communicating any information or data heretofore received from any such computer or
28 computer system accessed without such authorization.

1 Defendant shall further deliver by mail or email a copy of this Order to its agents,
2 servants, employees, and all other persons acting in concert with or in conspiracy with or
3 affiliated with Defendant, as well as all third parties known to have, or subsequently found to
4 have, received the Presentation from Defendant or its agents, servants, employees, successors or
5 assigns or any other persons acting in concert with, or in conspiracy with, or affiliated with
6 Defendant or from any other source, within five (5) business days from the date of this Order.

7 In addition, Defendant shall provide a copy of this Order to third parties found, after the
8 date of the Order and during the pendency of this action, to have received the Presentation from
9 Defendant or its agents, servants, employees, successors or assigns, or any other persons acting in
10 concert with, or in conspiracy with, or affiliated with Defendant or from any other source, within
11 five (5) business days of having made such discovery.

12 Because Plaintiff has already posted the \$10,000 bond in connection with the temporary
13 restraining order, the Preliminary Injunction is immediately effective and shall remain in effect
14 during the pendency of this action.

15 **IT IS SO ORDERED.**

16
17 Dated: _____, 2008

The Honorable Claudia Wilken
United States District Court Judge

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